UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

RESCAP LIQUIDATING TRUST, Plaintiff, - against - SUMMIT FINANCIAL MORTGAGE LLC f/k/a SUMMIT FINANCIAL, LLC AND SUMMIT COMMUNITY BANK, INC. f/k/a SHENANDOAH VALLEY BANK, N.A. Defendant.	:	Adv. Pro. No. 14-01996 (MG)

MEMORANDUM OF LAW OF DEFENDANTS SUMMIT FINANCIAL MORTGAGE LLC AND SUMMIT COMMUNITY BANK, INC. IN SUPPORT OF THEIR MOTION TO WITHDRAW THE REFERENCE

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MEMORANDUM OF LAW OF DEFENDANTS SUMMIT FINANCIAL MORTGAGE LLC AND SUMMIT COMMUNITY BANK, INC. IN SUPPORT OF THEIR MOTION TO WITHDRAW THE REFERENCE

Defendants Summit Financial Mortgage LLC ("Summit Mortgage") and Summit Community Bank, Inc. ("Summit Community") (collectively "Summit") submit this Memorandum of Law in support of their motion for an order, pursuant to 28 U.S.C. §157(d), Federal Rule of Bankruptcy Procedure 5011 and Local Bankruptcy Rule 5011-1, withdrawing the reference of this matter to the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court").

PRELIMINARY STATEMENT

In this action Plaintiff Rescap Liquidating Trust ("RFC") asserts state law claims arising out of the sale of mortgage loans by Summit Mortgage to Residential Funding Company LLC f/k/a Residential Funding Corporation ("RFC") prior to RFC's bankruptcy. This is one of eleven cases with similar state law claims filed in Bankruptcy Court in May 2014. Plaintiff also asserts a state law guaranty claim against Summit Community for its alleged guaranty of Summit Mortgage's contractual obligations.

Plaintiff's recent filing of this action and others in the Bankruptcy Court followed RFC's broader campaign to transfer to a single venue, *i.e.*, the Bankruptcy Court, the more than 70 separate cases with similar claims that RFC had filed in various other courts, mostly in Minnesota where it was headquartered. That campaign was unsuccessful, as the Minnesota courts uniformly rejected RFC's blatant attempt at forum-shopping, and denied RFC's transfer motions. In particular, the Minnesota courts rejected RFC's contentions that "convenience" and "efficiency" justified transfer of the actions to Bankruptcy Court. Accordingly, RFC is currently prosecuting a voluminous number of cases -- in which it is asserting the same contract and indemnification claims asserted here -- in Minnesota in federal district court, not in bankruptcy court.

Summit's motion to withdraw the reference should be granted for several reasons. First, Plaintiff's only claims -- for breach of contract, indemnification and guaranty -- are quintessential state law claims that do not arise under title 11 (the Bankruptcy Code) and bear no meaningful relationship to RFC's confirmed Chapter 11 Plan. Accordingly, the Bankruptcy Court lacks jurisdiction over this matter.

Moreover, regardless of whether the Bankruptcy Court has the authority to exercise jurisdiction, the motion to withdraw the reference should be granted based on the relevant factors described by the Court of Appeals for the Second Circuit in the seminal case *In re Orion Pictures Corp.*, 4 F.3d 1095 (2d Cir. 1993), *cert. dis.*, 511 U.S. 1026 (1994). Each of the governing factors set forth in *Orion* weighs heavily in favor of withdrawal:

- First, Plaintiff's breach of contract, indemnification and guaranty claims are non-core, meaning that the Bankruptcy Court cannot enter a final judgment resolving those claims. As the Second Circuit has made clear, this is the single most important factor in determining whether the reference should be withdrawn.

- Second, withdrawal of the reference would promote judicial economy. Because the Bankruptcy Court cannot finally adjudicate this action, its findings would necessarily be subject to *de novo* review by the District Court. Thus, allowing the case to remain in the Bankruptcy Court would result in a duplication of effort and a waste of judicial resources.

- Third, there will be no delay or added expense from withdrawal of the reference. This case is in a preliminary stage as Summit has not yet responded to the Complaint, there have been no motions, and no discovery has been exchanged.

- Fourth, allowing the case to remain in the Bankruptcy Court would not promote uniformity of bankruptcy administration because Plaintiff's exclusively state law claims do not implicate any bankruptcy law.

- Fifth, allowing the case to remain in the Bankruptcy Court would reward Plaintiff's forum-shopping.

For all these reasons, the reference should be withdrawn and the case heard before an Article III District Court judge.

FACTUAL AND PROCEDURAL BACKGROUND

A. Background

Plaintiff alleges that prior to bankruptcy it was in the business of acquiring and securitizing residential mortgage loans and that its business model was built on acquiring loans from correspondent lenders such as Summit. Complaint, ¶¶ 2 and 3.[1] Plaintiff further alleges that over the course of the parties' relationship, Summit sold over 2,500 mortgage loans to RFC pursuant to a written agreement annexed to the First Amended Complaint. *Id.*, ¶ 4 & Ex. A.

B. The Bankruptcy Proceedings

On May 14, 2012, various Residential Capital entities (including RFC; collectively, the "Debtors") filed voluntary petitions for reorganization in the Bankruptcy Court under chapter 11 of the Bankruptcy Code (the "Bankruptcy Proceedings"). The Bankruptcy Proceedings were jointly administered under the caption *In re Residential Capital, LLC,* Docket No. 12-12020 (Judge Glenn).

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[1] A copy of the Complaint is annexed as Exhibit A to the Declaration of Theodore R. Snyder, Esq., dated July 18, 2014 ("Snyder Dec."), which is submitted herewith.

Summit did *not* file a proof of claim in the Bankruptcy Proceedings.

On December 11, 2013, the Bankruptcy Court confirmed the Second Amended Joint Chapter 11 Plan Proposed by Residential Capital LLC, *et al.* and the Official Committee of Unsecured Creditors (the "Plan"). In connection with the confirmation of the Plan, the Bankruptcy Court also approved a more than $10 billion settlement with the trustees of numerous residential mortgage-backed securities securitization trusts (the "RMBS Settlement"). Complaint, ¶ 10. The Plan became effective on December 17, 2013.

By operation of the Plan, a Delaware statutory trust (the "Liquidating Trust") was established as the successor to the Debtors and pursuant to the Plan, the Debtors assigned to the Liquidating Trust certain assets, including various causes of action. The Amended and Restated Rescap Liquidating Trust Agreement, dated December 17, 2013 (the "Liquidation Trust Agreement"), provides that "the Liquidating Trust Board shall have power and authority to bring (or cause to be brought) *any action in any court of competent jurisdiction* to prosecute any Liquidating Trust Causes of Action (the "Any Court of Competent Jurisdiction Provision"). Liquidation Trust Agreement, p. 60, § 13.2 (emphasis added). (A copy of the Liquidation Trust Agreement is annexed as Exhibit B to the Snyder Dec.)

C. RFC Files Numerous Similar Lawsuits In State And Federal Court

During the course of the Bankruptcy Proceedings, RFC filed at least three civil actions outside of the Bankruptcy Court in which it alleged state common law claims for breach of contract and/or indemnification arising out of the sale of mortgage loans. *See RFC v.*

MortgageIT, Inc., 13-cv-189 (D. Minn. Jan. 23, 2013); *RFC v. The Money Source Inc.*, 13-cv-317 (D. Minn. Feb. 7, 2013); *RFC v. Eagle Nat'l Bank*, 13-cv-448 (D. Minn. Feb. 25, 2013). Following confirmation of the Plan -- and in accordance with the Any Court of Competent Jurisdiction Provision -- RFC filed approximately 70 separate lawsuits against various alleged correspondent lenders; RFC filed the vast majority of cases in federal or state court in RFC's home state of Minnesota, as well as several in federal district in New York and one in New York state court. All of the complaints allege similar state common law claims for breach of contract and indemnification arising out of the respective defendants' sale of mortgage loans to RFC.

D. Plaintiff Seeks To Transfer All Of The Actions To The Bankruptcy Court

Plaintiff subsequently reversed course and launched a campaign to transfer all of the approximately 70 actions it had commenced to the Bankruptcy Court. In a dozen decisions rendered to date, Minnesota federal courts unanimously denied Plaintiff's motions to transfer. The courts rejected RFC's argument that "convenience factors" or the "interest of justice" warranted transfer. As explained by Judge Eriksen in a decision issued April 29, 2014 in *Residential Funding Company, LLC v. Cherry Creek Mortgage Co., Inc.*, Civil No. 13-3449 (JNE/SER), 2014 WL 168516 (D. Minn. April 29, 2014):

> Although the representations and warranties that Cherry Creek Mortgage allegedly breached may be similar to or the same as those that form the basis of Residential Funding's claims against other correspondent lenders, resolution of Residential Funding's claims against Cherry Creek Mortgage will ultimately depend on the loans that Cherry Creek Mortgage sold to Residential Funding. The loan-level evaluation distinguishes this action from the others brought by Residential Funding, as well as the bankruptcy proceedings. The Court is not persuaded that the familiarity with Residential Funding acquired by the bankruptcy court is such that transfer of this action to the Southern District of New York is appropriate.

Id. at *4. A copy of the decision is annexed to the Snyder Dec. as Exhibit D.

Plaintiff subsequently withdrew its remaining transfer motions filed in the Minnesota courts, and is currently prosecuting approximately 70 separate actions in Minnesota federal district court.

E. The Current Status Of This Action

On May 13, 2014 Plaintiff filed this action and 10 other similar complaints against alleged correspondent lenders in the Bankruptcy Court for the Southern District of New York. Like the other actions previously filed by RFC, the Complaint in this action and the others filed in Bankruptcy Court allege the same two state law breach of contract and indemnification claims.

Summit has not yet responded to the Complaint but intends to do so by way of a motion to dismiss. Judge Glenn recently conducted joint status conferences on this case with the others filed in Bankruptcy Court and three other pending cases commenced by RFC in New York federal or state court.[2] Motions to withdraw the reference have been filed in at least nine of those other cases.

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[2] In one of those cases, *Residential Funding Co., LLC v. GreenPoint Mortgage Funding, Inc.*, 13-cv-8937 (PK), at RFC's request, Judge Castel of the District Court administratively referred the case to the Bankruptcy Court pursuant to the District Court's standing order of reference; the administrative referral was accomplished without a motion, formal briefing or a hearing on the issue. In another case, *Residential Funding Company, LLC v. SunTrust Mortgage, Inc.*, 13-cv-8938 (RA), Judge Abrams of the District Court made the same administrative referral. In response to SunTrust's argument that the case should not be referred to the Bankruptcy Court because RFC could not satisfy the *Orion* requirements for withdrawing the reference, Judge Abrams (1) held that the argument was premature because referral was required by the District Court's Standing Order and (2) noted that SunTrust could advance that argument via a motion to withdraw the reference after the case was referred:

> However, as "all cases arising under or related to a case under Title 11 are automatically referred to the bankruptcy court" pursuant to the Standing Order, [citation omitted], it would be premature for the Court to conduct an Orion analysis prior to such referral. *If SunTrust ultimately seeks to withdraw the reference, the Court may do so at that time.*

Memorandum Opinion and Order dated July 3, 2014, pp. 5-6 (emphasis added) (copy annexed as Exhibit D to the Snyder Dec.).

ARGUMENT

I.

THE ACTION SHOULD BE HEARD BY THE DISTRICT COURT BECAUSE THERE IS NO BANKRUPTCY JURISDICTION

Plaintiff asserts bankruptcy jurisdiction under 28 U.S.C. § 1334 with the boilerplate statement that "the matter arises under title 11 or arises in or is related to the bankruptcy proceeding." Complaint, ¶ 15. Contrary to this conclusory assertion, there is no bankruptcy jurisdiction because this is not a core proceeding that arises under title 11 or in a case under title 11, and it is not a non-core proceeding that is related to a case under title 11.

A. There Is No "Arising Under" Or "Arising In" Jurisdiction

This action is not a "core" proceeding under bankruptcy law because it does not arise under title 11 or in a title 11 proceeding. 28 U.S.C. §1334 (b) provides that "the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." Cases "arise under" title 11 when the cause of action or substantive right claimed is created by the Bankruptcy Code. *MBNA Am. Bank, N.A. v. Hill,* 436 F.3d 104, 108–09 (2d Cir. 2006); *In re Housecraft Indus. USA, Inc.*, 310 F.3d 64, 70 (2d Cir. 2002). Cases "arise in" a title 11 proceeding if they "are not based on any right expressly created by title 11, but nevertheless, would have no existence outside of the bankruptcy." *Baker v. Simpson,* 613 F.3d 346, 351 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 928 (2011) (quoting *In re Wood,* 825 F.2d 90, 97 (5th Cir.1987)) (internal quotation marks and alteration omitted). "By contrast, '[a]n action that does not depend on the bankruptcy laws for its existence and which could proceed in a court that lacks federal jurisdiction is non-core.'" *In re Joseph DelGreco & Co., Inc.*, No. 10 CV 6422 (NRB), 2011 WL 350281, at *2 (S.D.N.Y. Jan. 26, 2011). Only a claim that is "an essential part of administering the estate" implicates the

Bankruptcy Court's core jurisdiction. *In re Ben Cooper, Inc.*, 896 F.2d 1394, 1400 (2d Cir. 1990).

Plaintiff's breach of contract, indemnification and guaranty claims are not expressly created by the Bankruptcy Code. Plainly, they could exist outside of bankruptcy -- as emphatically demonstrated by the fact that RFC commenced approximately 70 actions asserting similar claims for relief in Minnesota federal and state courts, and those cases are pending and being prosecuted in non-bankruptcy courts.

Plaintiff's state law breach of contract and indemnification claims arise out of a pre-petition contract with Summit; they are *not* core claims; and Summit did not file a proof of claim in the bankruptcy court that would affect the non-core status of the claims. *See In re EMS Fin. Servs.*, 491 B.R. 196, 203 (E.D.N.Y. 2013) ("a breach of contract action by a debtor against a party to a pre-petition contract who has not filed a proof of claim with the bankruptcy court is non-core"), quoting *Orion*, 4 F.3d at 1102; *see also Interconnect Tel. Servs., Inc. v. Farren*, 59 B.R. 397, 400 (S.D.N.Y. 1986) ("Non-core proceedings consist of those 'claims arising under traditional state law which must be determined by state law.' They are 'those civil proceedings that, in the absence of a petition in bankruptcy, could have been brought in a district court or state court.'") (citations omitted).

Plaintiff presumably will argue that there is "arising under" or "arising in" jurisdiction with respect to Count II of the Complaint -- for indemnification -- because the claim concerns amounts RFC became obligated to pay as a result of the RMBS Settlement entered into during the Bankruptcy Proceeding and approved by the Bankruptcy Court. Any such argument would be unavailing. There is no "arising under" jurisdiction because a right of action for indemnification does not arise under the Bankruptcy Code, and there is no "arising in" jurisdiction because an indemnification claim exists independent and outside of bankruptcy. Any right of indemnification Plaintiff may have against Summit arises from the pre-petition agreement between them, and such right would exist regardless of whether Plaintiff filed for bankruptcy.

Plaintiff may also argue, disingenuously, that there is bankruptcy jurisdiction because the Plan vests *exclusive* jurisdiction over these types of claims in the Bankruptcy Court. *See* Plan, *In re Residential Capital*, 12-12020 (MG), Dkt. No. 6065-1, p. 116 ("[O]n and after the Effective Date, the Bankruptcy Court shall retain exclusive jurisdiction over all matters arising out of, or related to, the Chapter 11 Cases and the Plan . . . .") That language is superseded by the Any Court of Competent Jurisdiction Provision in the Liquidation Trust Agreement, which authorizes the Liquidating Trust to bring "any action in any court of competent jurisdiction." The Liquidation Trust Agreement makes clear that the Any Court of Competent Jurisdiction Provision controls:

> 13.2 Jurisdiction. Subject to the proviso below, the parties agree that the Bankruptcy Court shall have exclusive jurisdiction over the Liquidating Trust, including, without limitation, the administration and activities of the Liquidating Trust, *provided, however*, (a) the Bankruptcy Court shall retain non-exclusive jurisdiction to the extent permissible under applicable law to hear and determine matters relating to the GM Policies and the GM Insurers, including rights under the GM Policies and (b) that *notwithstanding the foregoing or anything to the contrary set forth in the Plan, the Liquidating Trust Board shall have power and authority to bring (or cause to be brought) any action in any court of competent jurisdiction to prosecute any Liquidating Trust Causes of Action.* (Emphasis added.)

Exhibit B, p. 60. Plaintiff has invoked the benefits of the Any Court of Competent Jurisdiction Provision by commencing approximately 70 breach of contract/indemnification actions outside of the Bankruptcy Court. Under these circumstances, Plaintiff cannot credibly contend that the Bankruptcy Court has exclusive jurisdiction.

Plaintiff's claims do not arise under title 11, and they do not arise in a case under title 11.

B. There Is No "Related To" Jurisdiction

"Related to" jurisdiction is not present here. Plaintiff cannot satisfy the stringent requirements for invoking such jurisdiction - after the confirmation of a bankruptcy plan. Prior to bankruptcy plan confirmation, an action is generally deemed to be "related to" a bankruptcy proceeding so as to satisfy the jurisdictional requirement of 28 U.S.C. §1334 (b) "if the action's outcome might have any conceivable effect on the bankrupt estate." *Parmalat Capital Fin. Ltd. v. Bank of Am. Corp.*, 639 F.3d 572, 579 (2d Cir. 2011). The test is different and more stringent post-confirmation. After confirmation the party seeking to invoke bankruptcy jurisdiction must demonstrate a "close nexus" between the action and the bankruptcy proceeding -- meaning that (1) the action affects the interpretation, implementation, consummation, execution or administration of the bankruptcy plan, and (2) the plan provides for retention of jurisdiction of the matter. *In re DPH Holdings Corp.*, 448 F. App'x 134, 137 (2d Cir. 2011), *cert. denied*, 133 S. Ct. 51 (2012).[3] Post-confirmation "related to" jurisdiction requires evidence that the action will "affect[] an integral aspect of the bankruptcy process." *In re Metro-Goldwyn-Mayer Studios Inc.*, 459 B.R. 550, 556 (Bankr. S.D.N.Y. 2011).

Although Plaintiff can satisfy the second prong of the close nexus test (the Plan provides for retention of jurisdiction over this matter), it cannot satisfy the first as this action does not involve the interpretation, implementation, consummation, execution or administration of the Plan. The determination of the merits of this case depends upon the terms of the pre-petition written agreement between the parties, in particular the representations and warranties in the agreement and the indemnification clause and whether Plaintiff can prove actionable breaches of the agreement's terms. The Plan is not relevant to the determination of the merits.

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[3] Other Circuits have also adopted the close nexus test. *See, e.g., In re Kirkland,* 600 F.3d 310, 317 (4th Cir. 2010); *In re Pegasus Gold Corp.*, 394 F.3d 1189, 1194 (9th Cir. 2005); *In re Resorts Int'l, Inc.*, 372 F.3d 154, 166–67 (3d Cir. 2004).

Moreover, the governing case law makes clear that this requirement is not met merely because the outcome of this action may marginally increase or decrease the amount of money in the pot for creditors; such an effect does not implicate any "integral aspect" of the bankruptcy process. *See In re General Media, Inc.*, 335 B.R. 66, 75 (Bankr. S.D.N.Y. 2005) ("A bankruptcy court cannot hear a post-confirmation dispute simply because it might conceivably increase the recovery to creditors, 'because the rationale could endlessly stretch a bankruptcy court's jurisdiction.'") (citation omitted).

As this action is *not* a core proceeding (*see* Point IA above) and has nothing to do with the meaning or implementation of the Plan, there is no "related to" bankruptcy jurisdiction. Absent any "arising under," "arising in" or "related to" bankruptcy jurisdiction, the case should be returned to the District Court.

II.

WHETHER OR NOT THERE IS BANKRUPTCY JURISDICTION, THE REFERENCE SHOULD BE WITHDRAWN

The standard for withdrawal of the reference is set forth in 28 U.S.C. §157(d):

> The district court may withdraw, in whole or in part, any case or proceeding referred under this section on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

Based on the provisions of this statute, a referral to Bankruptcy Court in accordance with the District Court's Standing Order of Reference "is not a one-way street." *In re Coudert Bros.*, No. 11-Civ-4949 (PAE), 2011 WL 7678683, at *2 (S.D.N.Y. Nov. 23, 2011). District courts have broad discretion to withdraw the reference "for cause." *In re Enron Corp.*, 295 B.R. 21, 25 (S.D.N.Y. 2003); *EMS Fin. Servs.*, 491 B.R. at 200.

Section 157(d) does not define the term "cause," but the Second Circuit in *Orion* identified the five relevant factors a district court must consider in evaluating a motion to withdraw the reference. These include (1) whether the proceeding is core or non-core, (2) judicial economy, (3) delay and cost to the parties, (4) uniformity in bankruptcy administration and (5) reduction of forum shopping. *Orion*, 4 F.3d at 1101. *See also In re Burger Boys*, 94 F.3d 755, 762 (2d Cir. 1996). Each of these factors weighs heavily in favor of withdrawal in this case.

A. This Action Is Non-Core And The Bankruptcy Court Does Not Have Authority To Enter A Final Adjudication

As described above, this action is not a "core" proceeding because it does not arise under title 11 or in a title 11 proceeding. Further analysis of the Bankruptcy Court's authority is required under the Supreme Court's landmark ruling in *Stern v. Marshall*, 131 S. Ct. 2594 (2011), which modified the analysis of the first *Orion* factor (core/non-core). The goal of the analysis is still the same -- to determine whether the bankruptcy court has authority to enter a final judgment -- but in light of Article III considerations, the core/non-core distinction is no longer, by itself, dispositive of that issue. *Development Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP*, 462 B.R. 457, 467 (S.D.N.Y. 2011). That is because "finding that a matter is core does not ensure that the bankruptcy court has the constitutional authority to adjudicate it." *Pryor v. Tromba*, No. 13 CV 676 (JFB), 2014 WL 1355623, at *3 (E.D.N.Y. Apr. 7, 2014).

Instead, a bankruptcy court will only have authority to enter a final judgment in a matter if (1) the claim involves a public right[4], (2) a creditor has filed a proof of claim and the process of adjudicating the proof of claim would resolve a counterclaim, or (3) the parties consent to final adjudication by the bankruptcy court. *Id.*

The Bankruptcy Court does not have authority to enter a final judgment in this matter because it does not involve a public right; Summit did not file a proof of claim; and Summit does not consent to a final adjudication by the Bankruptcy Court. Thus, the first and most important *Orion* factor – whether the Bankruptcy Court has authority to enter a final judgment -- strongly favors withdrawal.

B. Withdrawing The Reference Would Promote Judicial Economy

Considerations of efficiency and judicial economy weigh in favor of withdrawal. Most importantly, the Bankruptcy Court's inability to enter a final judgment in this matter means the matter will be litigated twice -- once in the Bankruptcy Court and once in the District Court -- before any judgment will be entered.

As the Second Circuit recognized in *Orion*, "the fact that a bankruptcy court's determination on non-core matters is subject to *de novo* review by the district court could lead the latter to conclude that in a given case unnecessary costs could be avoided by a single proceeding in the district court." 4 F.3d at 1101. In the two decades since *Orion*, courts in this District have frequently followed the Second Circuit's direction and withdrawn the reference where the Bankruptcy Court could not finally adjudicate the matter. *See, e.g., DeWitt Rehab. and Nursing Center, Inc. v. Columbia Cas. Co.*, 464 B.R. 587, 593 (S.D.N.Y. 2012) ("Such duplicate reviews of the contracts and facts are costly and time-consuming, and unnecessarily expend judicial resources."); *Development Specialists*, 462 B.R. at 472 ("Withdrawal will promote judicial economy. Because the Bankruptcy Court is not able to finally determine these proceedings without the consent of the Firms – which does not appear to be forthcoming – any recommendations it makes will need to be reviewed *de novo* in this Court. It would be inefficient to allow these proceedings to go forward, knowing that they will have to be substantially repeated."); *In re BearingPoint, Inc.*, 453 B.R. 486, 488 (Bankr. S.D.N.Y. 2011) (in light of BR court's inability to enter a final judgment, "this action will be tied in procedural knots by motion practice,"); *In re Durso Supermarkets, Inc.*, 170 B.R. 211, 214 (S.D.N.Y. 1994) ("Because the Action is non-core, determinations made by the bankruptcy court would be subject to *de novo* review by this court. Thus 'unnecessary costs could be avoided by a single proceeding in the district court.'").

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[4] In *Stern*, the Supreme Court recognized that the public rights exception has been the subject of debate, but concluded that the exception was limited to "cases in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert government agency is deemed essential to a limited regulatory objective within the agency's authority." 131 S. Ct. at 2611-15. This action is between two private parties concerning a contract they entered into and is not a matter involving public rights. *See Dynegy Danskammer, L.L.C. v. Peabody COALTRADE Intl. Ltd.*, 905 F. Supp. 2d 526, 531 (S.D.N.Y. 2012) ("Regardless of the exact contours of the public rights exception, the state law breach of contract claim here is clearly outside its bounds.").

We anticipate Plaintiff will argue that judicial economy will be served if the action remains in Bankruptcy Court because of Judge Glenn's familiarity with the Bankruptcy Proceedings. The argument is specious. *See Cherry Creek*, *supra*, slip. Op. at 8 (rejecting RFC's argument for transfer to the bankruptcy court based on judge's "familiarity" with the issues).

Coudert Bros. is squarely on point. There, the District Court withdrew the reference and rejected the debtor's argument that in light of the bankruptcy judge's vast knowledge of the bankruptcy proceedings the case should remain in the Bankruptcy Court to promote judicial economy:

> Although Judge Drain is deeply familiar with the facts of Coudert's bankruptcy proceedings, this adversary case is *sui generis*. It appears likely that it will turn significantly if not entirely, on the interpretation of [a] single contract—the engagement agreement—and the course of dealings between Coudert and Peabody . . . .

Coudert Bros., 2011 WL 7678683, at *6. *See also M. Fabrikant & Sons Inc. v. Long's Jewelers Ltd.*, No. 08-CV-1982, 2008 WL 2596322, at *4 (S.D.N.Y. June 26, 2008) (rejecting the debtor's judicial economy argument based upon the bankruptcy judge's knowledge of the bankruptcy because "[w]hile Judge Bernstein has familiarity with Fabrikant's estate, the dispute in this case [is] discrete, involving a non-core contract claim.").

Similar to these precedents, Plaintiff's claims against Summit arise wholly from the written agreement between them. Specifically, Plaintiff alleges that Summit breached certain representations and warranties contained in a Client Guide that is incorporated into a written Client Contract (the "Agreement") between the parties, and that Summit is obligated to indemnify it pursuant to the terms of the Agreement.[5] Complaint, Exhibit A, ¶¶ 73-84. Although Judge Glenn is familiar with the Bankruptcy Proceedings, he has no particular familiarity with the Agreement or any other aspect of the dispute between Plaintiff and Summit; under the governing case law, that is the familiarity that matters. Given the very preliminary status of this action -- Summit has not yet responded to the Complaint, no discovery has been exchanged, and no motion practice has occurred -- Judge Glenn would have no reason to be familiar with the factual or legal issues unique to this case.

Moreover, any analysis regarding alleged representation and warranty breaches in this case -- as in any similar case -- will be fact-intensive and require careful review of the

[5] The Agreement and the Client Guide incorporated therein are annexed to the Complaint as Exhibit A, and are together more than 500 pages long.

Agreement, Summit's underwriting procedures and the communications between the parties.[6] Given the factual complexity of this case, it is most efficient to litigate this case in a single forum authorized to enter final judgments. Further, the Bankruptcy Court has no particular expertise compared to the District Court regarding claims for breach of contract or indemnification.[7] This is particularly true in the context of cases involving mortgage securitizations, as many District Court judges have such cases on their dockets.

The second *Orion* factor strongly favors withdrawal.

C. Withdrawal Would Not Result In Cost And Delay To The Parties

Withdrawing the reference at this very early stage of the proceedings would not result in any undue cost or delay to the parties. *See LightSquared Inc. v. Deere & Co.*, No. 13 Civ. 8157 (RMB), 2014 WL 345270, at *6 (S.D.N.Y. Jan. 31, 2014) ("because the Adversary Proceeding is still in its relatively early stages, withdrawal will not impose undue cost or delay on the parties."); *Dynegy*, 905 F.Supp.2d at 533 (withdrawal warranted where "[d]efendant's Motion was filed shortly after the Complaint was filed, and no discovery or extensive motion practice has come before the bankruptcy court"). Indeed, for all of the reasons set forth in Point IIB above, there will be undue cost and delay to the parties if the reference is not withdrawn.

The third *Orion* factor strongly favors withdrawal.

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[6] One of the reasons Judge Glenn presumably does not have any familiarity with the specific issues in this case is that Plaintiff entered into the RMBS Settlement expressly to avoid the "uncertain and protracted litigation" awaiting it -- where such judicial familiarity might be obtained. *See* Debtors' Second Supplemental Motion Pursuant to Fed. R. Bankr. P. 9019 for Approval of the RMBS Trust Settlement Agreements. *In re Residential Capital*, 12-12020 (MG), Dkt. No. 1887, ¶ 47.

[7] Summit intends to argue in a motion to dismiss, *inter alia*, that (1) Plaintiff's claims are barred by the statute of limitations and (2) Plaintiff has no standing to bring this action because in the course of the mortgage loan securitization process it assigned its rights to assert claims for breach of representations and warranties to others. Like Plaintiff's claims, these defenses arise under state law, not bankruptcy law.

D. Allowing The Case To Remain In The Bankruptcy Court Would Not Promote Uniformity In Bankruptcy Administration

Whether a bankruptcy court's adjudication of a claim would promote uniformity of bankruptcy administration is solely a function of the nature of the claim, and courts routinely have found no such benefit where the claims are based on state law and do not raise substantive issues of bankruptcy law. *Dynegy*, 905 F. Supp. 2d at 533; *Joseph DelGreco*, 2011 WL 350281, at *5; *see also M. Fabrikant & Sons*, 2008 WL 2596322, at *5 (holding that withdrawing the reference does not hamper uniform administration of the bankruptcy law when the claim is non-core).

On point is the decision in *Development Specialists* where in granting a motion to withdraw the reference, the District Court found that purely state law claims for damages did not implicate bankruptcy law, even if they might bring more assets into the estate:

> Withdrawal will not interfere with the uniform administration of the bankruptcy law. [Plaintiff's] claim[s] . . . are creatures of state law, not federal bankruptcy law. Their resolution will at most have the effect of augmenting the bankruptcy estate; it will have no impact that would require uniform, coordinated adjudication before the Bankruptcy Court. Nor does the Bankruptcy Court have any special expertise in resolving the New York law claims at issue here.

462 B.R. at 472-73. Because Plaintiff has asserted three purely state law claims (breach of contract, indemnification and guaranty) and Summit intends to assert legal defenses that also arise under state law (including statute of limitations and assignment), the adjudication of this action will have no impact whatsoever on bankruptcy law or the uniformity thereof.

The fourth *Orion* factor strongly favors withdrawal.

E. Plaintiff Will Be Rewarded For His Forum-Shopping If The Reference Is Not Withdrawn

Plaintiff has engaged in forum-shopping. RFC filed approximately 70 other cases in non-bankruptcy courts and then reversed course and engaged in a failed campaign to transfer those cases to the Bankruptcy Court. Plaintiff filed this case in bankruptcy court, but as the Minnesota courts have held, these claims are properly heard in a non-bankruptcy court. Plaintiff should not be rewarded for its attempt to file in what it perceives to be a more hospitable forum. *In re Houbigant, Inc.*, 185 B.R. 680, 686 (S.D.N.Y. 1995) ("[T]he concern about forum shopping alone, almost compels the Court to keep the case [out of bankruptcy court]").

The final *Orion* factor strongly favors withdrawal.

CONCLUSION

For the reasons set forth above, Summit respectfully requests that the reference to the Bankruptcy Court be withdrawn and this action be returned to the District Court.

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